

EXHIBIT 16

EXHIBIT 16

1 UNITED STATES BANKRUPTCY COURT
2 SOUTHERN DISTRICT OF NEW YORK

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4
5 In the Matter of:

6
7 TRANSMAR COMMODITY GROUP, Case No. 16-13625-jlg
8 LTD.,

9
10 Debtor.

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14 United States Bankruptcy Court
15 One Bowling Green
16 New York, New York

17
18 June 9, 2017
19 11:12 a.m.

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23 B E F O R E :
24 HON JAMES L. GARRITY
25 U.S. BANKRUPTCY JUDGE

1 Hearing re: Application for FRBP 2004 Examination Motion
2 for an Order Pursuant to Rule 2004 of the Federal Rules of
3 Bankruptcy Procedure Authorizing ABN AMRO Capital USA LLC to
4 Issue a Subpoena for the Further Production of Documents
5 from and the Oral Examination of AMERRA Capital Management
6 LLC, by Nancy Obler (Doc #255)

7
8 Hearing re: Declaration of Kenneth Pasquale in Support of
9 Motion for an Order Pursuant to Rule 2004 of the Federal
10 Rules of Bankruptcy Procedure Authorizing ABN AMRO Capital
11 USA LLC to Issue a Subpoena for the Further Production of
12 Documents from and the Oral Examination of AMERRA Capital
13 Management LLC, by Nancy Obler (Doc # 256)

14
15 Hearing re: Objection of AMERRA Capital Management LLC to
16 the Motion for an Order Pursuant to Rule 2004 of the Federal
17 Rules of Bankruptcy Procedure Authorizing ABN AMRO Capital
18 USA LLC to Issue a Subpoena for the Further Production of
19 Documents from and the Oral Examination of AMERRA Capital
20 Management LLC, by Nancy Obler (Doc # 273)

21
22 Hearing re: Affidavit of John G. Hutchinson filed by John
23 C. Hutchinson on behalf of AMERRA Capital Management LLC

24
25 Hearing re: Reply to Motion ABN AMRO Capital USA LLCs Reply

1 in Further Support of its Motion for an Order Pursuant to
2 Rule 2004 of the Federal Rules of Bankruptcy Procedure
3 Authorizing ABN AMRO to Issue a Subpoena for the Further
4 Production of Document from the Oral Examination of AMERRA
5 Capital Management LLC, by Nancy Obler (Doc 289)

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25 Transcribed by: Dawn South

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1 P R O C E E D I N G S

2 THE COURT: All right. Good morning.

3 (A chorus of good morning)

4 THE COURT: This is Transmar Commodity Group Ltd.,
5 case number 16-13625. This is the adjourned hearing on the
6 motion that was filed by ABN AMRO seeking Rule 2004
7 discovery.

8 I'm not -- don't need to take appearances. I
9 thank you all for being here, and we adjourned this so that
10 -- the argument was on May 31st -- we adjourned it to give
11 the Court a little bit more time to consider the arguments,
12 and I'm now prepared to rule.

13 The matter before the Court is the motion of ABN
14 AMRO Capital USA LLC, I'll refer to it as ABN AMRO, as
15 administrative agent and collateral agent for itself and
16 other secured lenders, I'll refer to as the lenders, under
17 the amended and restated credit agreement dated as of
18 February 26th, 2016, as amended, for the entry of an order
19 pursuant to Rule 2004 of the Federal Rules of Bankruptcy
20 Procedure authorizing ABN AMRO to issue a subpoena for the
21 production of certain documents from and for oral
22 examination of Amerra Capital Management LLC, which I'll
23 refer to as Amerra, by Nancy Obler, a managing director.
24 See ECF document No. 255.

25 This is the second time that ABN AMRO has sought

1 Rule 2004 discovery from Amerra.

2 At the outset of these cases and by ex parte
3 motion dated January 17, 2017, which I'll refer to as the
4 first Rule 2004 motion, which is at ECF No. 71, it sought
5 such discovery with respect to, among other things -- that's
6 all right -- transactions among Amerra and the debtor,
7 Transmar Commodity Group Ltd., or Transmar, or Transmar's
8 affiliate, Euromar Commodity GmbH, or Euromar.

9 Amerra objected to the discovery; however, after
10 several conferences among ABN AMRO, Amerra, and the Court,
11 Amerra agreed to produce to ABN AMRO documents "dating from
12 January 1, 2016 to the present sufficient to evidence the
13 facts, terms, and conditions or transactions between or
14 among Amerra, Euromar, and/or the debtor, provided that
15 Amerra was a party to some part of the transaction or a
16 related transaction involving the debtor or Euromar and in
17 fact possesses additional documents."

18 See the order pursuant to Rule 2004 of the Federal
19 Rules of Bankruptcy Procedure authorizing ABN AMRO to issue
20 subpoenas to Amerra dated February 14, 2017. That's ECF
21 document No. 125. I'll refer to that as the Amerra Rule
22 2004 order.

23 Amerra objected to ABN AMRO obtaining deposition
24 discovery on those matters and none was ordered.

25 In support of the motion, and among other things,

1 ABN AMRO asserts that through discovery obtained from the
2 debtors it is learned that in the months leading up to the
3 commencement of the Chapter 11 cases Ms. Obler played an
4 active role in advising the debtor's management team.

5 It contends that upon learning of that role its
6 counsel requested that Amerra voluntarily produce additional
7 documents beyond the scope of the Amerra Rule 2004 order and
8 voluntarily produce Ms. Obler for examination under oath,
9 but that Amerra refused that request. See the motion at
10 paragraph 4.

11 ABN AMRO asserts that there is an urgent need for
12 the Court to grant the motion. It maintains that it
13 requires what it characterizes as limited additional
14 documents from Amerra and Ms. Obler's oral examination in
15 order advance its investigation of the debtor's business and
16 final affairs. Motion at 17.

17 To that end it maintains that it requested -- that
18 the requested discovery will allow it to continue to (A),
19 investigate the debtor's recordkeeping processes and
20 operations, including, but not limited to, transactions with
21 its affiliates and certain third parties; (B), investigate
22 the facts, circumstances, and events that resulted in the
23 disappearance of hundreds of millions of dollars in
24 collateral value and other property of the debtor's estate
25 reflected in the borrowing of base reports; and (C),

1 determining whether the lenders, individually, and the
2 debtor's creditors, generally, have viable claims against
3 any parties as a result of the facts and circumstances that
4 resulted in this bankruptcy case. See the motion at 18.

5 Moreover, ABN AMRO asserts that its investigation
6 and any facts and information discovered as a result thereof
7 with inure to the benefit of the debtor's estate and its
8 creditors and will not be duplicative of any investigation
9 conducted by the creditors' committee. See the motion at
10 19.

11 Amerra opposes the motion. See the Amerra
12 objection referred to, that is the objection ECF document
13 No. 273.

14 And ABN AMRO submitted a reply to the objection.
15 See ECF document No. 293.

16 Amerra maintains that there's nothing new to ABN
17 AMRO about Amerra's alleged special relationship with the
18 debtor, because as early as January 24th, 2017 ABN AMRO
19 contended that Amerra has a "unique and uniquely close"
20 relationship with Euromar and Transmar and on that basis
21 sought wide ranging discovery, including emails. See the
22 objection at paragraph 4.

23 Moreover, it asserts that although the motion
24 portrays ABN AMRO's new discovery demands as a means to
25 locate hundreds of millions of dollars in collateral that

1 has disappeared, it made the same exact allegations in
2 support of the first Rule 2004 motion. See the objection
3 at 4.

4 To that end it maintains that the fundamental
5 basis of the first Rule 2004 motion was that Amerra's
6 transactions with Euromar and Transmar were somehow improper
7 and that documentation would show that Amerra was extracting
8 funds from the debtor. See the objection at 25.

9 It notes that in support of the first Rule 2004
10 motion ABN AMRO asserted that "whether and to what extent
11 Amerra benefited at the expense of the lenders and the
12 debtor's estate generally as a result of the debtor's
13 transactions and relationship with Euromar is ripe for
14 investigation." That's the objection at 25 citing the first
15 Rule 2004 motion at paragraph 18.

16 Amerra labels this as "ABN's grand conspiracy
17 theory." The objection at 31.

18 It maintains that this is the same basis on which
19 ABN AMRO is seeking discovery in this motion, thus as a
20 preliminary matter Amerra argues that the motion should be
21 denied because it amounts to an attempted bait and switch in
22 that ABN AMRO has brought no new information forward and
23 nonetheless is seeking discovery beyond the scope of that
24 authorized in the Amerra Rule 2004 order. See the objection
25 at paragraph 4.

1 Amerra asserts that in response to the Amerra Rule
2 2004 order it provided documents that were meticulously
3 organized by transaction, including each leg of 48 separate
4 cocoa transactions and was produced in its entirety by
5 April 11, 2017.

6 Although Amerra acknowledges that the Amerra Rule
7 2004 order preserved ABN AMRO's right to seek further Rule
8 2004 discovery from Amerra, it contends that ABN AMRO should
9 not be permitted to seek to obtain additional discovery
10 without first demonstrating to the Court that the
11 transaction documents that Amerra has produced to date
12 support what it characterizes as ABN AMRO's careless
13 allegations and furnish specific facts for burdening Amerra
14 with further discovery. See the objection at paragraph 30.

15 Amerra says that ABN AMRO's right to seek
16 additional Rule 2004 discovery was conditioned upon its
17 showing that the discovery provided to date is not
18 responsive to the document request.

19 In that regard it notes that the motion does not
20 mention the documents that it is -- that it has produced in
21 response to the Amerra Rule 2004 order, raise any question
22 about the information in those documents, or even indicate
23 that ABN AMRO has received -- has reviewed the documents.
24 See the opposition at -- objection at paragraph 2.

25 Thus Amerra asserts that the motion is an improper

1 attempt by ABN AMRO to get discovery from Amerra that is
2 beyond the scope of the Amerra Rule 2004 order.

3 Moreover, it maintains that there's nothing new in
4 the motion that would justify ABN AMRO's second bite at the
5 apple. See the objection at paragraph 31.

6 ABN AMRO denies that there has been a bait and
7 switch. It maintains that it is seeking Rule 2004 discovery
8 based on newly discovered information and precisely because
9 Amerra initially objected to producing emails or agreeing to
10 an oral examination. See the reply at paragraph 8.

11 Further it denies that its request for additional
12 information is an improper end-around the terms of the
13 Amerra Rule 2004 order and contends that through the motion
14 and the Rule 2004 discovery it is seeking information
15 necessary to determine whether claims beneficial to the
16 estate exist against Amerra or any other third party and to
17 determine what really happened to over \$300 million in
18 reported assets that suddenly went missing. See the reply
19 at paragraphs 4 and 6.

20 ABN AMRO asserts both that Ms. Obler's testimony
21 and documents are unquestionably relevant to such an inquiry
22 and that the discovery is expressly permitted by Rule 2004.
23 See the reply at 4.

24 It explains that the documents produced to date by
25 third parties in response to the Rule 2004 discovery request

1 demonstrate that Amerra was more than a mere trading partner
2 and creditor of Euromar and the debtor as Amerra portrays
3 itself. See the reply at 7.

4 ABN AMRO asserts that in light of this evidence
5 its renewed and more focused request for Rule 2004 discovery
6 from Amerra is exactly the type of additional discovery
7 expressly contemplated by the Amerra Rule 2004 order. See
8 the reply at paragraphs 3 and 8.

9 The Court notes that the entry of the Amerra Rule
10 2004 order was expressly "without prejudice to any parties'
11 right to attempt to seek further Rule 2004 discovery from
12 Amerra, and to Amerra's right to attempt to seek Rule 2004
13 discovery from ABN AMRO or any other lenders or interested
14 parties and without prejudice to Amerra's or ABN AMRO's or
15 any other interested parties' right to object to such
16 further Rule 2004 discovery." See the Amerra Rule 2004
17 order at page 2.

18 The Court does not read that reservation of rights
19 language as narrowly as Amerra reads it, and as such does
20 not agree with Amerra that that's a basis for denying the
21 requested relief. Accordingly the Court will consider the
22 merits of the motion.

23 In relevant part Rule 2004 provides that the Court
24 may authorize the examination of any entity relating to the
25 -- relating "to the acts, conduct, or property, or to the

1 liabilities and financial condition of the debtor or to any
2 matter which may affect the administration of the debtor's
3 estate." See Federal Rule of Bankruptcy Procedure 2004(b) .

4 To that end the examination may extend to matters
5 relating "to the operation of any business and to the
6 desirability of its continuation -- continuance, the source
7 of any money or property acquired or to be acquired by the
8 debtor for purposes of consummating a plan, and the
9 consideration given or offered therefore in any other matter
10 relevant to the case or the formulation of a plan." That's
11 Rule 2004(b) .

12 Rule 2004 does not mandate that the Court grant
13 discovery, rather it "provides the Court -- that the Court
14 may order disclosure thereunder giving the Court significant
15 discretion." See In re: Board of Directors of Hopewell
16 International Insurance Ltd., 258 B.R. 580 at 587,
17 Bankruptcy Southern District of New York, 2001.

18 It is settled that in exercising that discretion
19 the Court must "balance the competing interest of the
20 parties weighing the relevance of and necessity of the
21 information sought by examination. That documents meet the
22 requirement of relevance does not alone demonstrate that
23 there is good cause for requiring their production." In re:
24 Drexel Burnham Lambert Group, Inc., 123 B.R. 702 at 712,
25 Bankruptcy Southern District of New York, 1992.

1 Courts deny Rule 2004 motions when the "cost and
2 disruption to the examinee attending to the requested
3 examination outweigh the benefits to the examiner." In re:
4 Express One International, Inc., 217 B.R. 215 at 217,
5 Bankruptcy Eastern District of Texas, 1998. See also In re:
6 Sunedison, Inc., 562 B.R. at 249.

7 The court note the that requests cannot be so
8 broad as to be more disruptive and costly to the examinee
9 than beneficial to the examiner.

10 Amerra contends that the motion should be denied
11 because the relief sought is unduly burdensome and
12 altogether unnecessary. See the objection at 5.

13 It asserts that the debtor has produced some 2.6
14 million pages of documents and that the production appears
15 to include all Transmar emails with Amerra, including those
16 with Ms. Obler and emails between Ms. Obler and Peter B.
17 Johnson, one of the debtor's principals. See the objection
18 at 5.

19 It maintains that it should not have to expend
20 what it says will be hundreds of thousands of dollars and
21 enormous resources and time providing internal emails and
22 emails with parties other than Transmar and Euromar because
23 the Court authorized ABN AMRO to take examinations of the
24 debtor's current and former employees and others, and that
25 discovery, coupled with the debtors' mails and files of ABN

1 AMRO and its lender group, will sufficiently enable ABN AMRO
2 to make whatever arguments it wants to make about the
3 debtor's disclosures, reporting, and decision making or
4 about the debtor's relationship with Amerra. See the
5 objection at 5.

6 ABN AMRO argues that Amerra's focus on its efforts
7 to obtain deposition testimony from the debtor's former
8 employees is misplaced since most of the witnesses
9 subpoenaed by ABN AMRO has refused to testify on the grounds
10 of their First Amendment privilege against self-
11 incrimination. See the reply at paragraphs 3 and 12.

12 Moreover, it denies that its request for further
13 Rule 2004 discovery is either unduly burdensome or
14 unnecessary. It asserts that those requests are (1),
15 narrowly tailors; (2), require the electronic search and
16 oral examination of a single Amerra employee; and (3), are
17 not so duly burdensome as to outweigh the benefits to ABN
18 AMRO, the lenders, and other creditors. I

19 t maintains that the documents produced by the
20 debtor show that Amerra and Ms. Obler's extensive
21 communications concerning the debtors.

22 As a consequence it asserts that Ms. Obler's
23 testimony, emails, and other documents will provide a
24 primary source of information to determine how and why the
25 debtor misrepresented its financial position and what

1 happened to the debtor's missing assets. See the reply at
2 paragraph 10.

3 Further it asserts that to minimize burden on
4 Amerra in responding to the discovery request they have
5 limited the request to require the search of a single
6 custodian's electronic communications, that is the
7 electronic communications (A), between Nancy Obler and any
8 other Amerra officer, director, or employee, or
9 representative concerning the debtor, Euromar, any of their
10 affiliates, or related entities; and (B), between Nancy
11 Obler and any non-debtor third party concerning the debtor,
12 Euromar, and any of their affiliates or any related
13 entities. See the reply at 11.

14 The Court finds that the requested discovery is
15 unduly burdensome. Not only has ABN AMRO had access to
16 documents produced by the debtor that contained Ms. Obler's
17 emails and other communications between Amerra and the
18 debtor, it is undisputed that throughout 2016 ABN AMRO
19 engaged outside consultants to evaluate Transmar's business,
20 including its financials, the borrowing base inventory, and
21 internal controls.

22 As ABN AMRO has disclosed at hearings before the
23 Court, two of those advisors were Finance Support Services
24 and RPA Advisors, and both entities had access to the
25 debtor's books and records, systems and procedures, and

1 employees. Both produced reports to ABN AMRO regarding,
2 among other things, the accuracy of the debtor's borrowing
3 base to be sure the documents and deposition testimony that
4 ABN AMRO is seeking may shed light on the debtor's
5 operations and financial affairs.

6 However, the Court finds that ABN AMRO already has
7 access to relevant information and that it would be unduly
8 burdensome to Amerra to provide the documents and deposition
9 testimony that ABN AMRO is seeking.

10 It is settled that in situations like this where
11 the party seeking Rule 2004 discovery has access to the
12 information it is seeking from other sources courts will
13 deny the request for the discovery. See *In re: Texaco*, 79
14 B.R. 551 at 553, Bankruptcy Court Southern District of New
15 York, 1989. *In re: Duratech Industries, Inc.*, 241 B.R. 283
16 at 289 to 90, Eastern District of New York, 1999.

17 As the party seeking discovery ABN AMRO has the
18 burden of showing good cause for the examination. See in
19 re: *Sunedison, Inc.*, 562 B.R. 243 at 249, Bankruptcy Court
20 Southern District of New York, 2017.

21 As noted previously by its terms Rule 2004 permits
22 discovery only when it regards the acts, conduct, or
23 property or the liabilities and financial condition of the
24 debtor or to any matter which may affect the administration
25 of the debtor's estate or to the debtor's right to a

1 discharge.

2 The underlying purpose of Rule 2004 is to "allow
3 the Court to gain a clear picture of the condition and
4 whereabouts of the bankrupt's estate." King Corp. versus
5 John Mansville Corp., In re: Johns-Manville Corp., 42 B.R.
6 362 at 364, Southern District of New York, 1984.

7 Thus "a 2004 examination should only be used for
8 the legitimate purpose of obtaining information to the acts,
9 conduct, or property or to the liabilities and financial
10 condition of the debtor." See In re: Coffee Cupboard, 128
11 B.R. 509 at 514, Bankruptcy Eastern District of New York,
12 1991.

13 Amerra asserts that the motion is nothing more
14 than a transparent attempt by ABN AMRO to obtain a
15 litigation advantage through one-way discovery that should
16 not be countenance under Rule 2004.

17 It contends that ABN AMRO's counsel has advised
18 Amerra's counsel in no uncertain terms that ABN AMRO is
19 looking to file a lawsuit against Amerra. See the objection
20 at paragraph 6.

21 It maintains that ABN AMRO has singled it out
22 twice for sweeping Rule 2004 discovery requests, and that in
23 the context of these cases ABN AMRO has received from Amerra
24 the discovery that is appropriate under Rule 2004.

25 It maintains that any further discovery as to

1 Amerra should be done in the context of a cause of action
2 against it, if one exists, such that Amerra will have the
3 protections of the Federal Rules of Civil Procedure and the
4 ability to obtain its own reciprocal discovery. See the
5 objection at 6.

6 ABN AMRO denies that it has determined that it
7 will sue Amerra. Reply at 16.

8 It contends that investigating the facts,
9 circumstances, and events that resulted in the disappearance
10 of hundreds of millions of dollars in collateral value and
11 other property from the debtor's estate in order to
12 determine whether the lenders, individually, and the
13 debtor's creditors, generally, have viable claims against
14 the parties as a result of the circumstances that resulted
15 in this bankruptcy case. See the reply at 17.

16 It says that the facts and information that ABN
17 AMRO and the lenders obtained through the Rule 2004 process
18 will inure not only to the benefit of the lenders but also
19 to the benefit of the debtor's estate and its other
20 creditors. See the reply at paragraph 16.

21 Thus it asserts that the fact that it may discover
22 through this investigation facts supporting a potential
23 claim against Amerra or any other third party does not
24 preclude it from obtaining the requested discovery. See the
25 reply at 16.

1 Pursuant to the document request ABN AMRO is
2 seeking, (1), all documents, including emails, text
3 messages, and Bloomberg terminal messages to and from Nancy
4 Obler, including communications in which Nancy Obler was
5 copied as a cc, and any employee concerning the debtor
6 and/or any of the affiliates; and (2), all document,
7 including emails, text messages, and Bloomberg terminal
8 messages to and from Nancy Obler, including communications
9 in which Nancy Obler was copied as a cc, and any person
10 concerning the debtor and/or any of the debtor's affiliates
11 expressly excluding any documents sent to or from the debtor
12 and/or any of the affiliates, including as a cc; and (3),
13 any custodian using the email domain TransmarGroup.com.

14 The Court agrees with Amerra that the motion is
15 aimed at gathering information relevant to Amerra's actions
16 and connections with the debtors and its role, if any, in
17 advising the debtor in its dealings with the lenders.

18 ABN AMRO is seeking to confirm not only that
19 Amerra, through Ms. Obler, was aware of the events and
20 causes of action that led to the debtor's failure, but that
21 Amerra played an active role in assisting the debtors in
22 formulating their strategy for dealing with the lenders. In
23 that way the focus of the requested discovery is on Amerra,
24 not the debtors.

25 It is well settled that Rule 2004 examinations are

1 not generally permitted once an adversary proceeding has
2 been filed since discovery must be pursuant to the Federal
3 Rules of Civil Procedure. See, for example, In re: Bennett
4 Funding Group, Inc., B.R. 24 at 28, Bankruptcy Northern
5 District of New York, 1998, and In re: Drexel Burnham
6 Lambert Group, Inc., 128 B.R. at 711.

7 No such litigation is pending, nonetheless it's
8 clear to the Court that ABN AMRO has identified Amerra as a
9 litigation target and is seeking to utilize the liberal
10 discovery available under Rule 2004 to further this ultimate
11 litigation. That's not permitted.

12 See, for example, In re: J&R Trucking, Inc., 431
13 B.R. 818 at 822 to 823, Bankruptcy for the Northern District
14 of Indiana, 2010, where the court denied a creditor's Rule
15 2004 discovery request to identify third parties with
16 liability as beyond the scope of Rule 2004 and noting that
17 "no matter how artfully one tries to disguise the requested
18 examinations by dressing them up in the robes of bankruptcy
19 administration, their real purpose is to identify another
20 entity movants might be able to collect from and whether
21 those efforts would have any impact on the bankruptcy estate
22 is of no real concern to them."

23 The Court finds that the information ABN AMRO is
24 seeking from Amerra goes beyond "the acts, conduct, or
25 property, or to the liabilities and financial condition of

1 the debtor or to any matter which may affect the
2 administration of the debtor's estate." For this additional
3 reason ABN AMRO is not entitled to Rule 2004 -- the Rule
4 2004 discovery it is seeking from Amerria.

5 Based on the foregoing the Court's denies the
6 motion and so orders the record.

7 Any questions? All right. I think that's
8 everything we had to deal with today; is that right?

9 Thank you very much.

10 (A chorus of thank you)

11 (Whereupon, proceedings concluded at 11:38 a.m.)

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I N D E X

RULINGS

DESCRIPTION

PAGE

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C E R T I F I C A T I O N

I, Dawn South, certified that the foregoing transcript
is a true and accurate record of the proceedings.

Dawn South

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[administration - capital]

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